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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CASE NO.

80-6785

JOSEPH ROBERT SPAZIANO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

	PAGE
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING WRIT	4
CONCLUSION	6
CERTIFICATE OF SERVICE	7

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Respondent, the State of Florida, respectfully requests that this Court deny the instant Petition for Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's list of Constitutional and Statutory provisions involved requires the following addition:

FLORIDA RULE OF CRIMINAL PROCEDURE 3.510

> Upon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant of an attempt to commit such offense if such attempt is an offense, or may convict him of any offense offense which is necessarily included in the offense charged. The Court shall charge the jury in this regard.

STATEMENT OF THE CASE

The following clarification of Petitioner's statement of the case is required. Defense Counsel stated on the record that he informed Petitioner that the statute of limitations had run as to all lesser includeds of murder except murder in the first degree. (RA 2)[1/] He informed

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1/ RA __ Respondent's Appendix

Petitioner that by waiving the statute of limitations, he would enable the Court to instruct the jury on the lesser-included offenses of second-degree murder, third degree murder and manslaughter. (RA 2-3). Petitioner declined to waive the statute of limitations. (RA 2-6).

In defense counsel's words:

> [H]e has declined to waive. That is, he's willing and insists on the Court not instructing on any lesser included offense. (RA 3). (emphasis added)

The trial court immediately inquired of Petitioner:

> The Court: Mr. Spaziano, do you understand what Mr. Kirkland (defense counsel) has just said?
>
> Mr. Spaziano (Petitioner): Yes, Your Honor.
> The Court: Is that what you wish to do?
> Mr. Spaziano: Yes, Your Honor. (RA 3).

The Court inquired further informing Petitioner of the consequences of his choice and that it might be of benefit to him to waive the statute of limitations. (RA 4). Petitioner remained adamant: "I've made it. That's my decision, Your Honor." (RA 5-6). Although, as Petitioner notes, the jury rendered an advisory verdict recommending life imprisonment, the jury was not permitted to consider that Petitioner had been convicted of brutally raping a girl in Orange County and then blinding her by slitting her eyes open. Later, the judge realized his error and used the prior conviction as an aggravating factor when he overrode the jury recommendation of life imprisonment.

Petitioner never objected to the absence of lesser included offense instructions to the jury. Nor did his brief to the Florida Supreme Court touch on the issue. It was only through a Notice of Supplemental Authority that the issue was raised in the Florida Supreme Court.

SUMMARY OF ARGUMENT

The trial court properly instructed the jury on the only offense for which the statute of limitations had not run - first degree murder. No decision of this Court requires, as a matter of due process, a trial court to instruct a jury on an offense for which the accused cannot be convicted.

REASONS FOR DENYING WRIT

Petitioner contends that though the statute of limitations had run on lesser-includeds of first-degree murder, the trial court was obliged to instruct the jury on those charges at his trial for first degree murder. He claims that to omit the non-viable lesser included offenses violates his rights to due process.

Petitioner asserts that under Florida law an individual charged with a degree crime is entitled as a matter of right to have the jury instructed as to all degrees of the offense. He cites Fla. Rule of Criminal Procedure 3.490 and Brown v. State, 206 So. 2d 377, 381 (Fla. 1968) in support of his assertion.

However Petitioner overlooks Florida Rule of Criminal Procedure 3.510 and Holloway v. State, 362 So. 2d 333 (Fla. 3d DCA 1978) cert. denied 379 So. 2d 953 (Fla. 1980) cert. denied __ U. S. __ 66 L. Ed. 2d 137 (1980). Fla. R. Crim. P. 3.510 which is concerned with attempts to commit offenses requires instructions on attempts only if the attempt constitutes an offense. Holloway, to which this Court recently denied certiorari, held that a trial court is not required to instruct a jury on any lesser offense which is barred by the Statute of Limitations. 362 So. 2d at 335.

The cases upon which Petitioner relies, Keeble v. United States, 412 U. S. 205 (1973) and Beck v. Alabama, 447 U. S. __ 65 L. Ed 2d 392 (1980) do not entitle a defendant to jury instructions on lesser included offenses as a matter of due process. In Keeble this Court held that as a matter of equal protection indians were entitled to instructions on lesser-

included offenses even if the Major Crimes Act confers no original jurisdiction to a federal district court on that lesser-included. The majority in Keeble appears to have assumed that by requesting the instructions on the lesser-offense the accused would be subject to punishment by the Federal Court. Thus Keeble does not stand for the proposition that a court must instruct a jury on lesser included offenses on which it cannot convict the accused. See, Felicia v.U.S. 495 F. 2d 353 8th Cir. 1974)

Beck v. Alabama held the imposition of a death penalty pursuant to a conviction by a jury which was not permitted to consider verdicts of guilt on lesser included offenses violative of due process. In Beck an Alabama statute prohibiting trial judges to instruct the jury on lesser-included offenses where a capital offense is charged was invalidated. This Court specifically noted that the defendant's testimony at his trial would have entitled him to a lesser included offense instruction on felony murder, a lesser of the capital crime with which he was charged. The evidence in the case sub judice leaves no room for a finding of a lesser included offense. Tony Dilisio, a witness at trial, was told by Petitioner that he raped, stabbed and mutilated the bodies of the victims. (Transcript of Trial 626). Petitioner boasted that he showed his victims[2/] their vaginas after he cut them from the girls' bodies. Transcript of trial 626-627. Dilisio was shown the mutilated bodies of a female with cuts on her breasts, stomach and jaw. (TR 633-34). A clear distinction exists between this evidence and that adduced at Beck's trial. Since Beck was clearly subject to conviction for

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2/ The Witness was shown two bodies, one of which was in an advanced state of decomposition

the lesser-included denied to him by the Alabama statute, that case differs in a material aspect from the instant case. That distinction has already been recognized by this Court when it denied certiorari to Holloway v. State of Florida __ U. S. __ 66 L. Ed 2d 137 (1980).

Furthermore the instant case presents an even stronger position for the state than Holloway. In the case sub judice the Petitioner did not object to the trial court's decision not to instruct on the lesser included offenses for which the statute of limitations had run. In fact, Petitioner insisted that only instructions for first degree murder be given when he was given the choice between instructions for lesser offenses accompanied by a waiver of the statute of limitations or no waiver and no instructions for lessers. (RA.1-6). Moreover Petitioner does not allege, nor does the record intimate, that state delays allowed the statute of limitations to run. See, Holloway 66 L. Ed 2d at 138.

CONCLUSION

In light of the foregoing Respondent respectfully requests that this Court deny the instant Petition for Writ of Certiorari to the Florida Supreme Court.

Respectfully submitted,

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